

OATHS, NOTARIZATIONS, AND POWERS OF ATTORNEY IN THE MILITARY

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I. REFERENCES.

- A. 10 U.S.C. §§ 936 and 1044.
- B. AR 27-55, Notarial Services (10 April 1997).
- C. JA 272, Deployment Guide (Feb. 1994).

II. AUTHORITY OF U.S. MILITARY PERSONNEL TO ADMINISTER OATHS AND PERFORM NOTARIAL ACTS.

- A. 10 U.S.C. § 1044a grants named individuals the general powers of a notary public and of a consul of the United States.
- B. 10 U.S.C. § 1044b is intended to increase the acceptability of general and special powers of attorney prepared by legal assistance attorneys for their clients.
- C. 10 U.S.C. § 1044c is intended to increase the acceptability of advanced medical directives prepared by legal assistance attorneys for their clients.

- D. 10 U.S.C. § 936 grants named individuals power to administer oaths necessary for military administration (to include military justice) and necessary in the performance of their duties.

III. GENERAL OVERVIEW.

- A. Authority to administer oaths and perform notarial acts may be based on state or federal law.
- B. The authority granted by federal statutes (10 U.S.C. § 1044a and § 936) to administer oaths and perform notarial acts is
 - 1. Separate and apart from, and in addition to,
 - 2. Any authority provided by state law.
- C. Oaths administered pursuant to 10 U.S.C. § 936 are legally effective for the purposes for which the oaths are administered (e.g., military administration).
- D. Notarial acts performed under 10 U.S.C. § 1044a are legally effective as notarial acts for **all** purposes in all states (pursuant to the Supremacy Clause). In the past, not all states agreed; that is why § 1044b was passed in 1994:

Recognition by States of Military Powers of Attorneys codified at 10 U.S.C. § 1044b.

(a) INSTRUMENTS TO BE GIVEN LEGAL EFFECT WITHOUT REGARD TO STATE LAW. -- A military power of attorney

(1) is exempt from any requirement of form, substance, formality, or recording that is provided for powers of attorney under the laws of a State; and

(2) shall be given the same legal effect as a power of attorney prepared and executed in accordance with the laws of the State concerned.

(b) **MILITARY POWER OF ATTORNEY** -- For purposes of this section, a military power of attorney is any general or special power of attorney that is notarized in accordance with section 1044a of this title or other applicable State or Federal Law.

(c) **STATEMENT TO BE INCLUDED.** -

(1) Each military power of attorney shall contain a statement that sets forth the provisions of subsection (a).

(2) Paragraph (1) shall not be construed to make inapplicable the provisions of subsection (a) to a military power of attorney that does not include a statement described in that paragraph.

(d) **STATE DEFINED.** -- In this section, the term 'STATE' includes the District of Columbia, the Commonwealth of Puerto Rico, and a possession of the United States.

PRESCRIBED PREAMBLE FOR MILITARY POWERS OF ATTORNEY (insert at beginning of each general and special power of attorney in capital letters)

THIS IS A MILITARY POWER OF ATTORNEY PREPARED PURSUANT TO TITLE 10, UNITED STATES CODE, SECTION 1044b AND EXECUTED BY A PERSON AUTHORIZED TO RECEIVE LEGAL ASSISTANCE FROM THE MILITARY SERVICES. FEDERAL LAW EXEMPTS THIS POWER OF ATTORNEY FROM ANY REQUIREMENT OF FORM, SUBSTANCE, FORMALITY OR RECORDING THAT IS PRESCRIBED FOR POWERS OF ATTORNEY UNDER THE LAWS OF A STATE, THE DISTRICT OF COLUMBIA, OR A TERRITORY, COMMONWEALTH, OR POSSESSION OF THE UNITED STATES. FEDERAL LAW SPECIFIES THAT THIS POWER OF ATTORNEY SHALL BE GIVEN THE SAME LEGAL EFFECT AS A POWER OF ATTORNEY PREPARED AND EXECUTED IN ACCORDANCE WITH THE LAWS OF THE JURISDICTION WHERE IT IS PRESENTED.

E. Advanced Medical Directives. 10 U.S.C. § 1044c, is identical to the military power of attorney provision except it deals with advanced medical directives.

1. STATEMENT TO BE INCLUDED: 10 U.S.C. § 1044c requires similar language on all advanced medical directives as is on military power of attorneys. Substitute the words “Title 10, United States Code, Section 1044c” for “Title 10, United States Code, Section 1044b” and the words “advanced medical directive” for “power of attorney” in the above language to make this protection effective.

IV. OATHS.

- A. Oaths and affirmations are pledges where the individual making the oath swears or affirms the truth of statements made by them. Oaths and affirmations are used when taking affidavits or sworn statements and documents.
- B. Under 10 U.S.C. § 936(a) and AR 27-55, para. 3-2b, the following U.S. Armed Forces members on active duty, reservists serving on active or inactive duty for training, and Army National Guard members when serving on active duty under Title 10 U.S.C., may administer oaths for purposes of military administration, including military justice under the UCMJ:
 1. All JAs and legal officers of the Army.
 2. All summary courts-martial.
 3. All adjutants, assistant adjutants, acting adjutants, and personnel adjutants.
 4. All commanding officers of the Navy, Marine Corps, and Coast Guard.
 5. Persons empowered to authorize searches pursuant to MRE 315(d), MCM, 1984, for any purposes relating to search authorizations.
 6. All other persons designated by Armed Forces regulations or by statute.

- C. Under 10 U.S.C. § 936(b) and AR 27-55, para. 3-2c, the following U.S. Armed Forces members on active duty, reservists serving on active or inactive duty for training, Army National Guard members when serving on active duty under Title 10 U.S.C., may administer an oath to any person when it is necessary in the performance of their duties:
1. President, military judge, trial counsel and assistant trial counsel, for all general and special courts-martial.
 2. President and counsel for any court of inquiry.
 3. All officers designated to take a deposition.
 4. All personnel designated to conduct an investigation.
 5. All recruiting officers.
 6. All other persons designated by regulations of the armed forces or by statute. [i.e., Civilian personnel officers and designated representatives]
- D. Other Statutory Oaths. Any U.S. Armed Forces commissioned officer of any Regular or Reserve component, whether or not on active duty, may administer:
1. Oath of enlistment (10 U.S.C. § 502).
 2. Oath required for the enlistment or appointment of any person in the Armed Forces (10 U.S.C. § 1031).
 3. Any other oath required by law in connection with enlistment or appointment of any person in the Armed Forces (10 U.S.C § 1031).
- E. Procedures.
1. Oaths administered for military justice matters should be administered according to AR 27-10, chapter 11.

2. All other oaths should be administered as described in AR 27-55, para. 4-4.

V. NOTARIAL ACTS.

- A. Under the authority of 10 U.S.C. § 1044a and AR 27-55, para. 2-2a, the following persons have the general powers of notary public and of a consul of the United States in the performance of all notarial acts to be executed by any of the individuals listed in paragraph B below:

1. Civilian attorneys serving as legal assistance officers.
2. All active duty and reserve component judge advocates and warrant officers with a primary MOS of 55A; **NOTE:** Reserve component judge advocates and warrant officers may perform notarial services even in a non-duty status.
3. All adjutants, assistant adjutants, and personnel adjutants;
4. All other persons who are designated by regulations of armed forces or by statute to have those powers.
5. The following also qualify as military notaries with the following restrictions pursuant to AR 27-55:
 - a. Active duty and reserve component NCOs (including corporals) and legal specialists (authorized by their supervising SJA pursuant to para. 1-6) who -
 - (1) Possess a primary MOS of 71D; **AND**
 - (2) Serve under the immediate supervision of a judge advocate or DA civilian attorney employee;

- b. NCOs E6 and higher with primary MOS of 71D assigned as legal NCO to a brigade or higher unit even if not under the immediate supervision of an attorney.
- c. Active duty and reserve component E3 and E4 legal specialists with a primary MOS of 71D may serve as military or civilian notaries when the SJA certifies in writing to the Legal Assistance Policy division that:
 - (1) the soldier possesses appropriate judgment and maturity;
 - (2) the soldier is serving under the immediate supervision of a judge advocate or DA civilian attorney; AND
 - (3) the soldier is trained pursuant to AR 27-55.

NOTE: ENLISTED RESERVE COMPONENT NOTARIES CANNOT PERFORM NOTARY SERVICES IN A NON-DUTY STATUS WITHOUT THE AUTHORIZATION OF THE RESERVE COMPONENT SJA.

- d. All DA civilian attorney employees.

B. Individuals listed in paragraph A above may perform notarial acts for the following:

- 1. Members of **any** armed forces;
- 2. Other persons eligible for legal assistance under the provisions of section 1044, AR 27-3, or regulations of the Department of Defense;
- 3. Persons serving with, employed by, or accompanying the armed forces outside the U.S. and outside the commonwealth of Puerto Rico, Guam, and the Virgin Islands;
- 4. Other persons subject to the UCMJ outside the U.S.

- C. In accordance with 10 U.S.C. § 973b, AR 27-55 prohibits active duty commissioned and warrant officers from obtaining or retaining commissions as civil notaries. (This prohibition does **not** affect the authority of an officer to serve as a civil notary under state law - the laws of most states authorize certain U.S. Armed Forces members to provide notarial services within the military without obtaining commissions or appointments as civil notaries).

VI. NOTARIAL CERTIFICATIONS AND CONTENTS OF OATH.

- A. 10 U.S.C. § 936: The signature of the officer taking acknowledgments or sworn instruments, together with the title of his or her office, is prima facie evidence of the officer's authority, and an impressed or raised seal is not required.
- B. 10 U.S.C. § 1044a: The signature of any such person acting as notary, together with the title of that person's offices, is prima facie evidence that the signature is genuine, that the person holds the designated title, and that the person is authorized to perform a notarial act. A seal of any kind is not necessary.
- C. Notarization vs. Certification: There is a difference!
 - 1. NOTARIZATION: The notary signature and seal (if required) just indicate that the person purporting to sign the document appeared before the notary, produced identification or was known personally by the notary, and signed the document in the presence of the notary.
 - 2. CERTIFICATION: Signifies that the document is an accurate and complete and copy of the original document. Most public records and documents like marriage licenses, birth certificates, divorce decrees, titles, etc. are recorded in public offices and those offices certify copies.
 - 3. AR 27-55, para 4-5 prohibits notaries from certifying copies of public documents or records **except in the following circumstances**:
 - a. Military finance purposes or personnel purposes;

- b. Federal administration where authorized by law or regulation.
Examples are certain Veterans Administration benefits or Immigration and Naturalization Service documents.
- c. The military notary **must** indicate that these copies are certified for a limited purpose. (for example: certified copy for VA)

VII. POWERS OF ATTORNEY. (POA)

A. Definition.

- 1. A written instrument executed by one person, the principal,
- 2. Designating another individual, the agent or "attorney-in-fact,"
- 3. To perform specified acts on the principal's behalf.

B. Purpose.

- 1. To notify third parties of the agent's authority.
- 2. Powers of attorney are usually designated as either "special" or "general" depending on the specified act(s) or kind(s) of act(s) for which authority to act on behalf of the principal has been given.

C. Overview of Dangers.

- 1. Execute only when a reasonable or immediate need for the instrument exists.
- 2. No law requires third parties to recognize the authority of the agent to act on the principal's behalf as set forth in the POA; however, the majority of persons, businesses, and institutions will do so.

3. Personnel should be fully advised of the inherent dangers involved in granting to another the authority to act in their stead.

D. Special Powers of Attorney.

1. Any POA can be dangerous to the grantor if improperly used.
2. To reduce the risk, a special POA should be used whenever it can fulfill the needs of the client, because the power or authority given is limited to the specific act or acts described in the instrument.

E. General Powers of Attorney.

1. General POAs giving broad powers and authority to the attorney-in-fact can be dangerous instruments in the hands of persons inexperienced in business matters, persons of unstable temperament, or anyone in whom the grantor does not have the utmost trust and confidence.
2. The possibility of strained marital relations should be considered.
3. General POAs **will not** be notarized until a legal assistance attorney or a civilian attorney has counseled the prospective grantor on the dangers of executing such a document and has ascertained that a special or limited POA would not accomplish the purpose for which the general POA was requested. [AR 27-55, para. 3-4a (11)]
4. Under no circumstances should an unrestricted general POA be used or produced unless it contains a specific termination date or other provisions for revocation.

F. Termination or Revocation.

1. If no expiration date is contained in the POA, it continues in effect until statutory provisions for termination, operation of law (i.e., death of the principal or agent), or an act of the principal or agent evidencing an intent to revoke the power.

2. It is advisable to insert a termination clause in all POAs; for example, the principal may want the power to expire on or about the date of his or her expected return from an overseas tour of duty. This prevents the POA from being indefinite in duration and terminates it on a specific date, unless sooner revoked.
3. If no termination date is inserted in a POA or if the principal wishes to revoke the power prior to its stated termination date, notice of the revocation must be given to the agent.
 - a. Such notice preferably should be in writing, although it may be made orally, and
 - b. The agent then should be requested to acknowledge receipt of such notice.
4. Ordinarily, the revocation takes effect as soon as it is communicated to the agent.
5. As to third persons that have dealt with the agent, the revocation takes effect when they receive notice of the revocation.
6. Where a statute provides for the recording and revocation of POAs, third parties that do not have notice of an unrecorded revocation may be justified in relying on the continuance of the authority as recorded.
7. Additionally, in some states, the POA terminates upon the incapacity of the grantor, notwithstanding that the POA has no termination date or the termination date is subsequent to the date upon which the incapacity occurs.

G. Durable Powers of Attorney.

1. Durable POA is a special agency relationship that remains valid and operative despite the incapacity of the principal.

2. Under the common law, a POA becomes inoperative upon the disability of the principal. State statutory law has remedied this by giving powers to agents to act even during the incapacity of the principal.
3. Guardianship and conservatorship are a separate legal status which can conflict with the durable POA. Each state's separate rules control as to the relationship between these powers.
4. The lack of federal law dealing with durable POAs is a continuing problem.
 - a. Since there is no federal law on the subject, state law controls, and can be in the form of either state common law or state statutes.
 - b. Some statutes require the word "durable" to create a power that is capable of surviving the disability or incapacity of the principal.
 - c. The problem of having several different states [X, Y, and Z, for example], involved is a conflict of laws question. The Restatement of the Conflict of Laws 2d § 291 states:

The rights and duties of a principal and agent toward each other are determined by the local law of the state, which, with respect to the particular issue, has the most significant relationship to the parties in the transaction.....
 - d. Another possible conflicts problem is the validity of the agent's acts. According to The Restatement on Conflict of Laws 2d § 292, the validity of the agent's acts is determined by the law of the state which has the most significant relationship to the parties and the transaction. In any case, a choice of laws clause should be included.

H. Using Powers of Attorney for Child Care - FAMILY CARE PLANS [See, AR 600-20. Interim Chi. 102 (1 Apr 92), para 5-5].

1. Mission, readiness, and deployability needs especially affect Active Component (AC) and Reserve Component (RC) single parents and dual military couples with dependent family members.

2. AR 600-20, Interim Chi. 102, requires those soldiers to implement a Family Care Plan to provide for the care of their family members when military duties prevent the soldier from doing so.
 - a. Plans must be made to ensure dependent family members are properly and adequately cared for when the soldier is deployed, on TDY, or otherwise not available due to military requirements.
 - (1) RC soldiers are subject to these policies and regulations, and will implement plans during any periods of absence for Annual Training, regularly scheduled unit training assemblies, emergency mobilization and deployments, or other types of active duty.
 - (2) All married soldiers who have dependent family members are encouraged, even if not required by the regulation, to complete and maintain a Family Care Plan.
 - b. Commanders are responsible for ensuring that affected soldiers complete the Family Care Plan.
 - c. Affected soldiers are considered nondeployable until a Family Plan is validated and approved.
 - d. The DA Form 5305-R (Family Care Plan) is the means by which soldiers provide for the care of their family members when military duties prevent the soldier from doing so.
 - (1) DA Form 5305-R (Family Care Plan) must include:
 - (a) Proof that guardians and escorts have been thoroughly briefed on the responsibilities they will assume for the sponsor/soldier and on procedures for accessing military and civilian facilities and services on behalf of the dependent family members of the sponsor/soldier,

- (b) Attestation that the guardian and escort agree to provide care and have been provided all necessary legal authority and means to do so.
- (2) Proof of the foregoing will consist of (as a minimum) attachments to the DA Form 5305-R:
 - (a) DA Form 5841-R (Power of Attorney), or equivalent delegation of legal control, which the legal assistance office prepares, the soldier executes and has notarized, and the guardian/escort receives,
 - (b) DA Form 5840-R (Certification of Acceptance as Guardian or Escort) which the guardian/escort completes, has notarized, and returns to the soldier,
 - (c) DD Form 1172 (Application for Uniformed Service Identification Card DEERS enrollment) which the soldier executes for each dependent family member (AR 600-8-14 directs that ID cards will be issued for children under age 10 who reside with a single parent or dual military couple),
 - (d) DD Form 2558 (Authorization to start, stop, or change an allotment for Active Duty or Retired Personnel) which the soldier executes, or other proof of financial arrangements for the care of dependent family members, and
 - (e) Letters of Instruction executed by the soldier which contain additional pertinent information for escorts, temporary or long-term guardians.
- (3) DA Forms 5304-R, 5305-R, 5840-R and 5841-R will be locally reproduced.

- (4) Forms and sample Letter of Instruction contained in 102, AR 600-20.

I. Extension of Powers of Attorney if POW/MIA.

1. 1991 SSCRA Amendments extended coverage of 50 U.S.C. app. § 591 to soldiers missing in action (MIA). POAs are automatically extended if:
 - a. The POA was executed by an individual who is in missing status;
 - b. The POA designates the spouse, parent or other named relative as attorney-in-fact, and;
 - c. The POA expires by its own terms after the person entered missing status.
2. NOTE: The SSCRA provision does not cover Prisoner of War (POW) status!
3. The POA forms commonly used within the military will contain a POW-MIA clause.